UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JO DEE SCHMIDT, et al.,

Plaintiffs,

v.

JOHN HOOVER, et al.,

Defendants.
_____/

No. C 08-5809 PJH

ORDER GRANTING CITY OF WALNUT CREEK'S MOTION TO DISMISS

Before the court are defendants' motions to dismiss the complaint in the above-entitled action. Having read the parties' papers and carefully considered their arguments, and good cause appearing, the court hereby GRANTS the City of Walnut Creek's motion and DENIES John Hoover's motion.

BACKGROUND

Defendant City of Walnut Creek ("the City") maintains an area known as Walnut Creek Open Space ("WCOS"), which consists of 2700 acres of undeveloped oak woodland, savannah, and chaparral. The City issues grazing permits and contracts with local ranchers who graze cattle and bulls in WCOS. There are also hiking trails in the WCOS area, and Walnut Creek Municipal Code § 11-1.507(b) permits unleashed dogs in WCOS.

Plaintiffs allege that plaintiff Jo Dee Schmidt was hiking in the Acalanes Ridge Recreation Area, part of WCOS, on October 20, 2007. She had just passed another hiker

and that hiker's unleashed dog when she crested a hill and came upon a bull or cow (plaintiff isn't sure which), belonging to defendant John Hoover, a local rancher. The bull or cow charged her, trampling her and causing severe injuries. Ms. Schmidt spent 11 days in the hospital. In addition to her physical injuries, she now suffers from post-traumatic stress disorder.

Ms. Schmidt and her husband, plaintiff Paul Schmidt, filed this action on December 31, 2008, against the City and Hoover. The complaint alleges negligence, by Ms. Schmidt, against Hoover; loss of consortium, by Mr. Schmidt, against Hoover; and a claim of state-created danger resulting in denial of civil rights and privileges, under 42 U.S.C. § 1983, by Ms. Schmidt, against the City.

Plaintiffs allege that Hoover was aware that the bull or cow that trampled Ms. Schmidt had a "dangerous nature," and that he also had prior knowledge of the high probability of a dangerous confrontation between his bulls and cattle and the hikers who use WCOS. Plaintiffs assert that Hoover failed to warn against this dangerous situation in conscious disregard of the rights and safety of the hikers who use WCOS.

In addition, plaintiffs claim that the presence of unleashed dogs in WCOS increases the likelihood that cattle and bulls will view the presence of dogs and humans as a threat to their offspring. Plaintiffs assert that the City knows that the areas in which it permits unleashed dogs also contain unfenced bulls, cattle, and calves. Plaintiffs claim that the presence of the dogs and humans in these "grazing areas" has resulted in several injury-producing incidents involving bulls, cattle, people, and dogs in WCOS and other East Bay parks over the past several years, in which bulls and cattle have trampled and run over people and dogs, often doing serious injury to the people and the dogs.

The City now moves to dismiss the claim asserted against it (the third cause of action brought under § 1983) for failure to state a claim. Hoover also moves to dismiss the § 1983 cause of action for failure to state a claim. In addition, Hoover moves to dismiss the complaint for lack of subject matter jurisdiction, on the basis that without the federal claim, this court lacks jurisdiction over the remaining state claims.

DISCUSSION

A. Legal Standard

A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003). Review is limited to the contents of the complaint. Allarcom Pay Television, Ltd. v. Gen. Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). To survive a motion to dismiss for failure to state a claim, a complaint generally must satisfy only the minimal notice pleading requirements of Federal Rule of Civil Procedure 8. Rule 8(a)(2) requires that the complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

Specific facts are unnecessary – the statement need only give the defendant "fair notice of the claim and the grounds upon which it rests." Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). All allegations of material fact are taken as true. Id. However, a plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic, 550 U.S. at 555 (citations and quotations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id. A motion to dismiss should be granted if the complaint does not proffer enough facts to state a claim for relief that is plausible on its face. See id. at 557-58.

B. The City's Motion

The City argues that the third cause of action should be dismissed because the complaint fails to allege a violation of a right secured by the United States Constitution. In particular, the City contends that not every state law violation gives rise to a substantive due process violation. The City notes that in DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189 (1989), the Supreme Court specifically addressed the question whether substantive due process rights afford individuals the right of government protection from third-party conduct. The Court held that "a State's failure to protect an individual

against private violence simply does not constitute a violation of the Due Process Clause." Id. at 197.

Here, the City argues, the complaint fails to allege a violation of constitutional rights, as there is no basis for equating the allowance of cattle grazing in open spaces with deprivation of constitutional rights of liberty and bodily integrity. The City asserts that there is no constitutional right to be free from a cow attack, just as there is no constitutional right to be free from trip hazards in a public sidewalk.

The City contends that the essence of the § 1983 claim is the assertion that the City deprived Ms. Schmidt of substantive due process by failing to protect her from private violence – the attack by the cow or bull owned by defendant Hoover. However, the City asserts, the Due Process Clause does not confer a constitutional right to governmental protection of this kind, arguing that the substantive due process claim amounts to nothing more than an assertion that the City should have protected Ms. Schmidt from tortious conduct by a non-State actor, or that it should not have engaged in allegedly negligent conduct. .

In response to the suggestion in the complaint that the City is liable under the "state-created danger" exception to the general rule that there is no substantive due process right to protection by the state from private action, the City argues that plaintiff cannot rely on this exception because she does not allege that the City was deliberately indifferent to her well-being.

Four months after the Supreme Court issued its ruling in DeShaney, the Ninth Circuit recognized the "state created danger theory" in Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989). In that case, the police officer arrested the driver of a car and impounded a vehicle which left the passenger, Wood, stranded in a high crime area early in the morning where she was attacked. The Ninth Circuit found that the governmental actors disregard of Wood's safety amounted to deliberate indifference, and held that a substantive due process claim could be established where the police create a danger to an individual. Id. at 558.

Here, the City argues, the issuance of grazing permits is not the kind of affirmative,

deliberately indifferent conduct necessary to trigger substantive due process protections. Similarly, the City asserts, the Walnut Creek Municipal Code provision permitting hikers to walk their unleashed dogs in WCOS does not implicate Ms. Schmidt's substantive due process rights. Thus, the City argues, under the facts pled, the City's actions did not create the danger that caused the injury to Ms. Schmidt.

The City also contends that its alleged "inaction" – the alleged failure to respond to prior incidents of bull or cow attacks in the WCOS – cannot be fairly considered as having created the danger that resulted in the harm to Ms. Schmidt. In the complaint, plaintiffs allege only that the City was "aware" of those purported prior incidents, and the danger that unfenced bulls and cows posed to hikers in the WCOS. The City argues that such conclusory allegations and the unwanted inferences drawn by plaintiffs are insufficient to support a claim that City officials exhibited "deliberate indifference" to Ms. Schmidt's health and safety, which is a requirement for implicating her substantive due process rights.

In opposition to the City's motion, plaintiffs argue that Ms. Schmidt has alleged all the elements of the "state created danger" exception. Plaintiffs assert that Ms. Schmidt has properly stated a § 1983 claim against the City by alleging that the City took affirmative acts by entering into grazing contracts and issuing grazing permits to Hoover, which permitted Hoover to graze bulls and calving stock cattle in WCOS; and also by alleging that the City and Hoover both knew that hikers and unleashed dogs were present in the same area as bulls and calving cattle, and furthermore, knew of the unreasonable risk of harm presented by the situation.

Plaintiffs argue that the dangerous nature of bulls is so well-known as to be beyond dispute. Plaintiffs contend that it is less well-known to the public that a calving cow will act aggressively to protect her calf if she feels that it is being threatened. Plaintiffs contend that the complaint adequately pleads that the City knew of the dangers posed by the presence of bulls and cows in WCOS, where unleashed dogs and hikers were present, as it alleges that several injury-producing incidents had previously occurred.

Plaintiffs argue that despite this knowledge of an unreasonable risk of harm to hikers

in WCOS, the City continued its policy of allowing unleashed dogs in WCOS, pursuant to Walnut Creek Municipal Code § 11-1.508, and of entering into grazing contracts and issuing grazing permits to ranchers such as Hoover.

Plaintiffs assert that in doing so, the City created a danger to Ms. Schmidt that would have not otherwise have existed in WCOS. Plaintiffs claim that the harm Ms. Schmidt suffered as a result of the City's policy of permitting bulls and cows to roam freely among unleashed dogs and people is "precisely the kind of harm that any person would instantly recognize if presented with a full understanding of the scenario, of the tendency of bulls and calving cattle, and of the history of injury-producing events caused by the bulls and cattle at the WCOS." Plaintiffs assert that Ms. Schmidt has properly alleged injury to constitutionally protected rights to personal security, liberty, and freedom from bodily invasion, and that she has therefore alleged a valid cause of action under § 1983.

The court finds that the motion must be GRANTED. Title 42 U.S.C. § 1983 "provides a cause of action for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States." Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to harmed parties. See Wyatt v. Cole, 504 U.S. 158, 161 (1992).

Section 1983 does not itself create substantive rights, but rather provides a vehicle for individuals to assert violation of rights established elsewhere in the Constitution or federal laws. Baker v. McCollan, 443 U.S. 137, 140 (1979). To state a claim under § 1983, a plaintiff must allege facts that show a deprivation of a right, privilege or immunity secured by the Constitution or federal law by a person acting under color of state law. See West v. Atkins, 487 U.S. 42, 46 (1988). In this case, it is not disputed that the City of Walnut Creek was acting under color of state law. Therefore, the question is whether the City's actions deprived Ms. Schmidt of a right, privilege or immunity secured by the Constitution or federal law.

Plaintiffs allege that "in entering into grazing contracts that contemplated and permitted Hoover to place bulls and stock cattle into the Acalanes Ridge Open Space section of the WCOS," thereby creating danger from violence to plaintiff Jo Dee Schmidt, the City deprived Ms. Schmidt of her rights under the Fourteenth Amendment to the United States Constitution, including her rights to "liberty and bodily integrity, or other substantive due process rights." Cplt ¶¶ 33-35.

To state a claim against a municipality for a § 1983 violation, the plaintiff must plead facts showing (1) that she possessed a constitutional right of which she was deprived; (2) that the municipality had a policy; (3) that the policy "amounts to deliberate indifference" to the plaintiff's constitutional right; and (4) that the policy is the "moving force behind the constitutional violation." Oviatt v. Pearce, 954 F.2d 1470, 1474 (9th Cir. 1992) (quoting City of Canton v. Harris, 489 U.S. 378, 389-91 (1989)). Of these factors, the only one that the City addresses is the first one.

The Due Process Clause of the Fourteenth Amendments protects persons from the deprivation of their life, liberty and property without due process of law, and has both procedural and substantive components. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992). Due process protection in the substantive sense limits what the government may do in both its legislative and executive capacities, regardless of how many procedural safeguards it employs. County of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998). It protects against a State's interference with personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education, as well as with an individual's bodily integrity. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

Substantive due process may be expanded only with the greatest care, and its protection is primarily reserved for liberties deeply rooted in the nation's history and tradition. Doe v. Tandeske, 361 F.3d 594, 596 (9th Cir. 2004). It is clearly established that not every state law violation gives rise to a substantive due process violation. See Lewis, 523 U.S. at 847-48 (1998); Shanks v. Dressel, 540 F.3d 1082, 1089 (9th Cir. 2008).

In DeShaney, the Supreme Court Court specifically addressed the question whether

substantive due process rights afford individuals the right of government protection from third-party conduct. The Court held that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." Id., 489 U.S. at 197 (defendant County not liable for Department of Social Services' failure to intervene and protect a child from an abusive father).

The Court added that while the Due Process Clause "was intended to prevent government from abusing [its] power, or employing it as an instrument of oppression," nothing in the language of the clause itself "requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." Id. at 195-96 (citation and quotation omitted). Even if a state official refuses to provide protective services that could avert injuries, the government cannot be held liable under § 1983. Id. at 196.

In particular, § 1983 does not impose liability for violations of duties of care arising out of state tort law. See id. at 201-03 (1989); see also Baker, 443 U.S. at 146. "[T]he Due Process Clause is not implicated by the lack of due care of an official causing unintended loss or injury to life, liberty, or property. Davidson v. Cannon, 474 U.S. 344, 347 (1986); see also Daniels v. Williams, 474 U.S. 327 (1986). To state a claim a plaintiff must show a specific constitutional or federal guarantee safeguarding the interests that have been invaded. See Paul v. Davis, 424 U.S. 693, 697 (1976).

Here, plaintiffs have not alleged facts showing that the City deprived Ms. Schmidt of fundamental liberty or bodily integrity rights guaranteed by the Fourteenth Amendment. At most, they have alleged negligence on the part of the City – possibly a failure to warn of known dangers.

Under Deshaney, the City was not directly responsible for the cow/bull attack on Ms. Schmidt. Moreover, plaintiffs have not established that the "state-created danger" exception to Deshaney applies in this case, because they have not alleged facts showing that the City acted with deliberate indifference to Ms. Schmidt's safety or well-being, and that the City took specific actions that affirmatively placed Ms. Schmidt into a dangerous situation.

Since it issued the Wood decision, the Ninth Circuit has further refined the "state-created danger" exception. In L.W. v. Grubbs, 92 F.3d 894 (9th Cir. 1996), a female registered nurse employed at a medium-security custodial institution for male juvenile offenders was attacked by one of the inmates – a sex offender who had a history of violent assaults against women. The jury found the defendant liable under § 1983 under a theory of gross negligence, but not under a theory of conscious disregard or deliberate indifference. The Ninth Circuit rejected the "gross negligence" standard for culpability, concluding that "in order to establish [§ 1983] liability in an action against a state official for an injury to a prison employee caused by an inmate, the plaintiff must show that the state official participated in creating a dangerous situation, and acted with deliberate indifference to the known or obvious danger in subjecting plaintiff to it." Id. at 900.

In Penilla v. City of Huntington Beach, 115 F.3d 707 (9th Cir. 1997), Juan Penilla became ill while on the porch of his home, and neighbors called 911 for assistance. Two police officers arrived first, found Penilla to be in need of medical attention, cancelled the 911 call, moved Penilla into the house, locked the door, and left. The next day, family members found Penilla dead inside the house. The Ninth Circuit found that the officers had violated Penilla's due process rights, concluding that the officers' affirmative exercise of state power that created a risk which, but for the affirmative action, would not have existed. Id. at 710. Specifically, the court held that the officers had clearly placed Penilla in a more dangerous position than the one in which they found him. Id.

In Munger v. City of Glasgow Police Dept., 227 F.3d 1082 (9th Cir. 2000), police officers in Glasgow, Montana, were called for assistance when Lance Munger, a visibly drunken bar patron, became belligerent inside the bar. Although it was late at night and below freezing outside, the officers ejected Munger, who was wearing only jeans and a t-shirt. The officers would not let him drive his truck, and would not let him re-enter the bar. He wandered off into the night, and subsequently died from hypothermia. The Ninth Circuit held that the officers had affirmatively placed Munger in a position of danger. Id. at 1087.

In Kennedy v. City of Ridgefield, 439 F.3d 1055, 1061 (9th Cir. 2006), and Johnson

v. City of Seattle, 474 F.3d 634, 639 (9th Cir. 2007), the Ninth Circuit reiterated that the state's failure to protect an individual against private violence can violate the guarantee of due process where the state action affirmatively places the plaintiff in a position of danger – that is, where state action creates or exposes an individual to a danger to which he or she would not otherwise have been exposed.

In Kennedy, the plaintiff reported to a City of Ridgefield police officer that a neighbor had molested her nine-year-old daughter, and also reported the neighbor's known, violent tendencies. The plaintiff requested that the police notify her prior to making any contact with the neighbor. Two weeks later, the police officer went to the neighbor's house, and reported the allegations to his wife, without first advising the plaintiff. Within eight hours of learning of the allegations against him, the neighbor shot and killed plaintiff's husband, and shot and severely wounded plaintiff. The Ninth Circuit found that in notifying the neighbor and his family of the allegations against the neighbor, the officer had affirmatively created a danger to the plaintiff that she would not otherwise have faced. Id., 439 F.3d at 1063.

In Johnson, the plaintiffs were assaulted and injured during the course of a riot in Seattle's Pioneer Square on Mardi Gras. The violent and riotous behavior had begun the previous Friday, continued on Saturday, but diminished on Sunday and Monday when the police presence was stronger. On Tuesday, however, the crowd was once again out of control. More than six dozen people were injured, and one person was killed. Nevertheless, the Ninth Circuit found no evidence that the police had engaged in any affirmative conduct that enhanced the dangers the Pioneer Square plaintiffs exposed themselves to by participating in the Mardi Gras celebration. Id., 474 F.3d at 641.

In every case in which the court found state-created danger, the state actor played a significant role in creating the dangerous situation: whether by revealing the plaintiff's allegations to the neighbor in Kennedy, ejecting the drunk patron from a bar in Munger, dragging the injured man inside his house in Penilla, assigning the nurse to work alone with a known sex-offender in Grubbs, or stranding a woman in a dangerous area in Wood. By contrast, in Johnson, the court held that a state official cannot affirmatively place an

individual in danger by merely failing to act. Id., 474 F.3d at 641.

In short, for the "state-created danger" exception to apply, a plaintiff must show conduct by the state actor that rises to something more than a mere failure to act, and must also show some contact or connection with the injured party that creates a causal connection between the state actor's conduct and the increased danger. See, e.g., Jamison v. Storm, 426 F.Supp. 2d 1144, 1155 (W.D. Wash. 2006).

Here, the exception does not apply, as plaintiffs have not alleged facts supporting a claim that the City was deliberately indifferent to a known or obvious danger to Ms. Schmidt. Plaintiffs assert that despite knowledge of the danger posed to hikers, the City continued to allow unleashed dogs in WCOS in the presence of cows and bulls. This argument is nothing more than a claim that the City failed to act despite knowing of a specific danger.

Moreover, the facts pled in the complaint fail to establish that the City had sufficient contact with Ms. Schmidt to create the necessary causal connection between the City's conduct and the alleged increased danger caused by mixing cows and dogs/hikers. The Ninth Circuit's opinions discussing the "state-created danger" exception all support a finding that there must be some affirmative action by the state actor directed toward the particular plaintiff who is suing under § 1983 – not just inaction that generally affects the public at large (or even a particular segment of the public).

Here, there is no allegation that City officials or employees advised Ms. Schmidt that it was safe to hike in WCOS in the presence of cows/bulls or unleashed dogs, and no allegation that City officials or employees assured Ms. Schmidt that they would provide her with protection from cow/bull attacks while she was hiking in WCOS. Plaintiffs allege no affirmative act on the part of the City that directly placed Ms. Schmidt in danger, thereby depriving Ms. Schmidt of her constitutional rights.

The facts alleged in the complaint do not support a claim of a substantive due process violation, and that there is no way that plaintiffs can amend the complaint to do so. Thus the dismissal is WITH PREJUDICE.

C. Hoover's Motion

As noted above, Hoover argues that the § 1983 claim should be dismissed for failure to state a claim, and that the complaint should then be dismissed for lack of subject matter jurisdiction because Ms. Schmidt did not have a federal claim under § 1983 as of the time the complaint was filed.

In opposition, plaintiffs argue that Hoover's motion to dismiss the § 1983 cause of action is improper because the complaint clearly indicates that the § 1983 claim is brought by Ms. Schmidt against the City of Walnut Creek only. Plaintiffs also argue that Hoover's motion to dismiss the complaint for lack of subject matter jurisdiction is improper because it is based solely on the asserted failure to state a claim under § 1983.

The court finds that the motion must be DENIED. Plaintiff is correct that Hoover cannot move to dismiss the third cause of action, as that claim is not asserted against him.

CONCLUSION

In accordance with the foregoing, the third cause of action brought under 42 U.S.C. § 1983 is dismissed for failure to state a claim. The court declines to exercise jurisdiction over the supplemental state law claims, pursuant to 28 U.S.C. § 1367(c)(3). Accordingly, the action is DISMISSED.

The date for the hearing on the motions, previously set for Wednesday, April 22, 2009, is VACATED.

IT IS SO ORDERED.

Dated: April 15, 2009

PHYLLIS J. HAMILTON
United States District Judge